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SUPREME COURT, U.S.

No. 80-6039

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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ROBERT LEE GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that, at his first trial, the government deliberately provoked him into requesting a mistrial and that therefore his reprosecution is barred by the Double Jeopardy Clause.

1. On November 8, 1978, an indictment was returned in the United States District Court for the District of Maryland charging petitioner with conspiring to distribute heroin, in violation of 21 U.S.C. 846 and 18 U.S.C. 2.

At the jury trial of petitioner and two others, Special Agent Robert Dixon of the Drug Enforcement Administration testified on direct examination that heroin dealers ordinarily do not distribute heroin through heavy users. On cross-examination, defense counsel questioned Dixon about the DEA form that had been filled out when petitioner was arrested. The form showed that petitioner was a heroin user. Defense counsel then asked Dixon if he had been the arresting officer. Dixon replied that he could not remember who made the arrest. He was then asked to

step from the witness chair to counsel table to examine the DEA form to ascertain who had signed it as arresting officer. After doing so, Dixon stated that:

> Mr. Green was processed by myself at the United States Marshal's office. At the time he was arrested, I believe, by Special Agent McCormack. He was currently incarcerated for armed robbery.

(Pet. App. 2-3, 14-15). As a result of this improper reference to petitioner's previous conviction, petitioner moved for and was granted a mistrial.

Thereafter, petitioner moved to dismiss the charges against him on the ground that retrial would violate the Double Jeopardy Clause. After a hearing, the district court denied the motion. The court explained (Pet. App. 3-4):

> The Court is satisfied that Agent Dixon was not the individual who is in charge of the case, that this was not a tactic that was planned ahead of time by the Government, that this was a spur of the moment statement. Unfortunate, it is true, but via the agent. I think that he, personally, frankly -- I think that although he intended to make a statement, and he probably intended it to have an effect on the Jury, he did not realize what effect it was really going to have and that was to end the case at that point against Mr. Green. He was agitated by the effective cross examination that was being conducted against him on this point of whether or not he had actually filled out the form, and he lost his cool, so to speak, and spilled the beans, and in doing so, resulting in a mistrial [sic]. But I do not believe it is a situation in which justice would be served by ending all prosecution. I do not believe it would be a violation of the double jeopardy clause to require the trial to commence again.

The court of appeals affirmed, Judge Winter dissenting (Pet. App. 1-22).

2. As a general rule, "'a motion by the defendant for mistrial is * * * assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.'" United States v. Dinitz, 424 U.S. 600, 607 (1976) (quoting United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion)). Only when prosecutorial or judicial errors are specifically "intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions" are the protections of the Double Jeopardy Clause implicated. 424 U.S. at 611. See Divans v. California, 434 U.S. 1303 (1977) (Rehnquist, Circuit Justice).

Measured by this standard, petitioner's double jeopardy argument must fail. As the district court expressly found, Agent Dixon "did not realize [that his reference to the previous conviction would] end the case at that point against [petitioner]" (Pet. App. 4). Agreeing with this finding, the court of appeals labeled Dixon's statement a "blurt" and a "reflexive counterpunch" (Pet. App. 6). Petitioner does not challenge these characterizations of the agent's improper remark, and, in any event, the district court's finding regarding Dixon's motive is not clearly erroneous.

Relying on United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), however, petitioner argues that reprosecution may be barred by the Double Jeopardy Clause "where a mistrial is caused by governmental bad-faith conduct short of an intention to cause a mistrial" (Pet. 7). In Kessler, the prosecutor knowingly introduced a false exhibit that caused serious prejudice to the defendants, and the court declared a mistrial at the defendants' request. In barring reprosecution, the court of appeals held that the double jeopardy prohibition is aimed at "'gross negligence or intentional misconduct'" by the prosecutor that compels the defendant to discontinue the proceeding. 530 F.2d at 1256, quoting United States v. Beasley, 479 F.2d 1124, 1126 (5th Cir.), cert. denied, 414 U.S. 924 (1973). By contrast to the prosecutor's intentional and premeditated misconduct in Kessler, Agent Dixon's impulsive remark in the present case did not constitute "overreaching" (530 F.2d at 1257-1258) of the type the Kessler court had in mind.

Moreover, as this Court noted in Dinitz, supra (424 U.S. at 611, quoting United States v. Jorn, supra, 400 U.S. at 485), the situations in which a defense-requested mistrial creates a double jeopardy bar primarily involve "'bad-faith conduct by judge or prosecutor'" (emphasis added). Although we do not suggest that an agent's misconduct resulting in a mistrial may never be attributed to the prosecutor for double jeopardy purposes, such attribution is not justified here, because the record contains no suggestion that the Assistant United States Attorney planned,

anticipated, or condoned the agent's misconduct.[1/] Indeed, as the court of appeals noted (Pet. App. 7), the prosecutor made a futile attempt to save the trial by requesting curative instructions. In such circumstances, the public should not be deprived of its important "right to have the issue of [petitioner's] guilt or innocence litigated" (Pet. App. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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1/ The prosecutor told the district court that he was "just as surprised as anyone else when the statement came out" (Pet. App. 7 n.8).